IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	DIVISION ONE
Respondent,	)	No. 61863-6-I
v.	)	UNPUBLISHED OPINION
D.F., d.o.b. 6/19/92,	)	
Appellant.	)	FILED: July 20, 2009

Dwyer, A.C.J. — D.F., a juvenile, appeals his conviction for attempted rape in the first degree of his younger sister, A.F. D.F. contends that the evidence introduced at trial—that he followed A.F. into her room, forcibly removed her clothing at knifepoint, lay on top of her, and began making thrusting motions on her, before being interrupted by an adult's arrival home—was insufficient to support the conclusion that he intended to engage in intercourse, an essential element of attempted first-degree rape. We disagree and affirm.

D.F. does not dispute that A.F. testified as to certain events at a fact-finding hearing: namely, that one evening, when D.F. was 15 years old and A.F. was 12, and the only adult at home (their cousin) was in the garage working on his car, A.F. spilled some food on her shirt and went upstairs to change it. Notwithstanding that D.F. had been forbidden to enter A.F.'s room as a result of a prior incident of sexual conduct toward her, he followed her upstairs with a knife and, when she went into her room, he followed her in and closed the door

behind him. Holding the knife in front of him, he then ordered A.F. to take her clothing off. When she refused, he forcibly took A.F.'s clothing off himself, still threatening her with the knife. He then pushed her onto her bed, climbed on top of her, and began moving vigorously up and down upon her. A.F. asked him to stop and tried to stop him, but he continued until the sound of the children's uncle unlocking the front door carried upstairs. At this point, D.F. leapt up and briefly left the bedroom before returning and telling A.F. that he would cut her if she told anyone what had happened.

D.F.'s primary contention[1] is straightforward. He contends that this recitation of facts categorically cannot support a conviction for attempted rape in the first degree. Put another way, he contends that insufficient evidence was introduced at trial to support his conviction. Specifically, D.F. argues that this is so because, in order to convict him of attempted rape in the first degree, the trial court was required to find as a factual matter that, at some point during the events in A.F.'s bedroom, he intended to "engage[ ] in sexual intercourse with" A.F. RCW 9A.28.020; RCW 9A.44.040. According to D.F., while his intent was unquestionably sexual in nature, there is simply no way that A.F.'s testimony can support the inference that he intended to force *intercourse*, defined as having its

[1] D.F. also argues that the trial court violated the appearance of fairness doctrine when it questioned a witness for the prosecution. However, D.F. did not object to this questioning at trial, and so cannot raise this issue unless the court's conduct amounted to a "manifest error affecting a constitutional right." RAP 2.5(a)(3). D.F. has not even attempted to demonstrate that the purported appearance of fairness violation was of constitutional magnitude, and so, consistent with case law, we decline to address this claim. See, e.g., State v. Tolias, 135 Wn.2d 133, 140-41, 954 P.2d 907 (1998); State v. Morgensen, 148 Wn. App. 81, 91, 197 P.3d 715 (2008) ("The doctrine of waiver applies to bias and appearance of fairness claims."); State v. Bolton, 23 Wn. App. 708, 714-15, 598 P.2d 734 (1979).

"its ordinary meaning and occur[ing] upon any penetration, however slight," and also meaning "any penetration of the vagina or anus however slight, by an object," or "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another." RCW 9A.44.010(1)(a), (b), (c).

"When considering facts in a challenge to sufficiency of the evidence, courts will draw all inferences from the evidence in favor of the State and against the defendant. A reviewing court will reverse a conviction for insufficient evidence only where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt." State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005) (citation omitted).

Viewing the evidence and all inferences therefrom in the light most favorable to the State, we find no merit in D.F.'s contention that the trial court could not reasonably infer from D.F.'s actions that he intended to force intercourse with A.F. Specifically, we hold that such a conclusion is foreclosed by our decision in State v. Jackson, 62 Wn. App. 53, 813 P.2d 156 (1991).

In Jackson, the defendant, like D.F., challenged his conviction based upon his assertion that the fact finder could not reasonably have concluded that he intended to force intercourse. The defendant in that case had backed a 14-year-old girl into her mother's bedroom and told her to lift up her skirt or he would kill her. Jackson, 62 Wn. App. at 55. The girl told the defendant "no," and continued to back up. When she could back up no further, she screamed, at

which point the defendant told her that he was "just joking" and left. Jackson, 62 Wn. App. at 55. We concluded that this sequence of events supported an inference of intent to force intercourse. Jackson, 62 Wn. App. at 57-58.

The facts in this case are even more indicative of an intent to force intercourse than were the facts presented in Jackson. In particular, unlike in Jackson—where the defendant was both unarmed and never actually touched the victim—when A.F. refused D.F.'s order to remove her clothes, D.F. removed them himself at knifepoint. D.F. then actually climbed atop A.F. and began thrusting himself against her. Similarly, unlike the defendant in Jackson, when the victim attempted to resist—in Jackson by screaming, in this case, by telling D.F. "no" and attempting to fight him off—D.F. did not relent. Rather, he only relented upon hearing the children's uncle return home.

The Washington cases that D.F. puts forth in opposition to the authority of Jackson do not warrant the conclusion that D.F. wishes us to draw from them. Specifically, D.F. discusses the facts of three cases in order to show "what is required for an attempted rape conviction." Two cases have particularly egregious facts. See State v. Kroll, 87 Wn.2d 829, 833, 558 P.2d 173 (1976) (murder victim's blood present on defendant's underwear); State v. Ray, 63 Wn.2d 224, 225-26, 386 P.2d 423 (1963) (defendant choked the victim unconscious, tried to unzip his pants, and told her that he was going to have intercourse with her). Apparently, D.F. intends to persuade us that because the facts in those cases obviously support the inference that intercourse was

intended, such a degree of obviousness is *required* to support an inference of the requisite intent. But we rejected essentially the same argument in Jackson, 62 Wn. App. at 57-58, and so decline to analyze it further here. The third case cited by D.F. does not involve facts particularly more demonstrative of intent to force intercourse than those of the present case: there, the defendant "force[d] his hand under [the victim's] clothing, and attempted to kiss her." State v. Gatalski, 40 Wn. App. 601, 603, 699 P.2d 804 (1985) (overruled sub silentio on other grounds by State v. Jackson, 112 Wn.2d 867, 774 P.2d 1211 (1989)). We upheld the defendant's conviction therein. Gatalski, 40 Wn. App. at 613. Thus, the case is not actually favorable to D.F.'s asserted position on appeal.[2]

As the State correctly argues, D.F.'s contention ultimately reduces to his assertion that, because he apparently had the opportunity to consummate intercourse, but did not actually do so, we must infer that he never intended to do so. But, as the State points out, there are a multitude of reasons why D.F. might have failed to consummate the ultimate act of rape, while nonetheless having intended to consummate it at some point during the events in question. One particular such reason is the interruption caused by the uncle's return home. We agree with the trial court, that the contrary inference is warranted: that when D.F. stripped A.F. at knifepoint, pinned her to the bed, and mounted her, he intended to force her to have intercourse with him. As we must draw all inferences in the State's favor, this is the inference drawn.

Affirmed.

[2] The foreign cases to which D.F. cites neither bind nor persuade us.

Dwyer, A.C.J.

WE CONCUR:

Schindler, C.J.

Ajid, J.